SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 538

ANTHONY CAMPISI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony Campisi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case as further described *infra*.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed in the Appendix to the Petition in No. 383 (October Term, 1962) to which this Petition is companion,* is reported in 306 F. 2d 308.

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* This petition and the one in No. 383 (*Coppolla and Sanantonio* v. *United States*) arise from the same criminal indictment, trial and conviction. The same counsel represents the respective petitioners in both this proceeding and in No. 383. Counsel trusts that duplicative printing of the opinion below as an appendix to this petition is not necessary.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (printed in Appendix to Petition in No. 383). Subsequent motion proceedings in the Court of Appeals on behalf of the instant petitioner resulted in an order by that Court on September 19, 1962, recalling its mandate,* and resulted also in affording petitioner an opportunity to submit for that Court's consideration a petition for rehearing. A petition for rehearing was then filed in the Court of Appeals on October 1, 1962,** was entertained by that Court, and was denied by it on the merits on October 3, 1962 (Appendix D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. In a prosecution for substantive offenses and conspiracy to violate 18 U.S.C. §495 by aiding and abetting the forging and uttering of stolen United States Government Bonds, upon an indictment drawn in 538 substantive counts and two conspiracy counts (involving separate conspiracies), the extraordinary number of counts being justified by the Government solely on the basis of the number of individual bonds allegedly forged and uttered, is such indictment abortive and insufficient on its face to charge an offense on the ground of violation of petitioner's right to due process of law?

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* The motion papers and the order recalling the mandate are in the certified original record filed herewith.

** Nine extra copies of the printed petition for rehearing are filed herewith.

2. Where the proofs under such indictment ultimately establish (ostensibly) only seventeen substantive offenses (and no conspiracy offense) involving petitioner, but where petitioner has been obliged to stand trial under the full indictment with all of its 540 Counts, and where despite the elimination of the more than five hundred other counts as to petitioner the jury is still permitted to consider all of the evidence introduced in the entire case in passing on the minuscule remainder of counts, is not the due process aggrievement referred to in question No. 1, above, intensified?

3. In the circumstances recited in the two preceding questions, was it not error to decline to entertain defense motions addressed to the prodigious scope of the indictment as having been waived by reason of untimeliness under F.R.Cr.P., Rule12; and in any event should not the right of severance have been preserved continuingly once the conspiracy counts were dismissed?

4. Was it error to instruct the jury that the alleged accomplice witness Bartkofsky, the sole inculpating witness against petitioner, was, in effect, an accomplice as a matter of law? (Not argued in this petition but preserved in the event of the granting of certiorari.)

5. The case being one where the uncorroborated testimony of an alleged accomplice witness was the sole inculpating testimony against petitioner, should the prevailing federal rule dispensing with the requirement of corroboration of an accomplice witness be reconsidered and abandoned? (Not argued in this petition but preserved in the event of the granting of certiorari.)

Constitutional Provisions, Statutes and Rules Involved

The case involves the Fifth Amendment of the Constitution of the United States (due process of law); 18 U.S.C. §495; 18 U.S.C. §2; 18 U.S.C. §371; F.R. Cr.P., Rules 8, 12 and 14. These provisions are printed in the Appendix to the companion Petition in No. 383, October Term, 1962.

Statement of the Case

Petitioner was convicted in the District Court, after a jury trial, under 34 Counts of a five hundred and forty count indictment which charged conspiracy and aiding and abetting the forging and uttering of stolen United States Government Bonds in violation of 18 U.S.C. §495 (and see 18 U.S.C. §2). These 34 conviction counts, in turn, represented merely a doubling of 17 forging counts to which were added the respective 17 corresponding uttering counts; in fact, even these 17 alleged situations are actually reducible to three or perhaps four specific incidents of alleged forging (*infra*). The five hundred and forty count indictment is printed at D9a-63a.[1] The judgment of conviction was not printed for the Court below; it appears in the certified copy of the transcript of record before the Court below which was filed with the Petition in No. 383. Petitioner was sentenced to eight years on each count, to run concurrently. Petitioner

[1] "D a" refers to the "Appendix to Appellants' Briefs" (printed) in the Court below, nine copies of which were filed with the companion Petition in No. 383. References herein to "Tr. " are to the typewritten stenographic minutes of the trial in the record on appeal (likewise filed in No. 383), the pagination used herein being the original stenographer's pagination. References to " a" herein, i.e., without any prefixed alphabetical designation, are to the printed "Appendix for United States of America" in the Court below, nine copies of which were filed with the Petition in No. 383.

appealed to the Court of Appeals from the judgment of conviction. The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction (Appendix B, *infra*).

The opinion of the Court of Appeals affirming the judgment of conviction (see appendix to the companion petition in No. 383) stated that the Court was not reaching the merits of questions raised by the instant petitioner and certain other defendants addressed to the length of the indictment, propriety of the joinder of defendants and offenses, and the denial by the Trial Court of motions to sever. These questions were not being reached, the Court of Appeals stated, because it held that the objections were waived in the Trial Court.

The opinion of the Court of Appeals also did not discuss the remarkable statistical actualities of this trial whereby this 540 Count indictment was washed down to a tiny fraction of that entire number of Counts when the time finally arrived for submission of the case against petitioner Campisi to the jury. This washing down of the prodigious original number of counts did not occur, moreover, as we show in detail *infra*, until after the entire mass of "evidence" relating to the entire 540 Counts had been spread before the jury; indeed all of this evidence was permitted to remain for consideration by the jury even after all but a very small number of the counts had been dismissed by the Trial Court.

The statistics to which we refer, as to the way in which the 540 Counts were ultimately washed down to a tiny percentage of the original total, are as follows, as affects petitioner Campisi:

The original 540 Counts consisted of 538 substantive Counts and two conspiracy Counts. Of these 538 substantive Counts, petitioner Campisi in the first place was never even named in 404 of them. Campisi was originally named only in Counts 405 through 471 (forgery) and Counts 472 through 538 (the corresponding uttering Counts). Since the use of separate Counts for the alleged forgeries and utterings worked a mere arithmetical doubling of the actual alleged offenses, it may be taken for the purposes of the present discussion that Campisi was originally named in 67 substantive counts. Of the two conspiracy counts, Campisi was named in only one of them (Count 540).

Of the 67 (or 134) original substantive Counts against Campisi, the only ones finally submitted to the jury were 17 forgery Counts plus the 17 corresponding uttering Counts (Counts 455 through 471, and Counts 527 through 538, respectively) (Tr. 1003). We shall show *infra* that even as to these 17 (or 34) Counts which were sent to the jury, five of them (forgery), or ten (to include the uttering Counts), should absolutely have been dismissed by the Court for failure of proof (Counts 458 through 462 and Counts 525 through 529, respectively). Thus, at most, the Government's "case" against Campisi actually never involved more than 12 (or 24, if such 12 Counts are doubled) Counts, as to which Campisi was obliged to stand trial under an indictment naming numerous other defendants and charging 538 substantive offenses. And, even as to these 12 Counts, the actual alleged forgery-uttering incidents involved were comprised of only three or perhaps four distinct transactions (see the tabular indictment breakdown of Counts 455 through 457, and 463 through 471, in the appellants' printed Appendix in the Court below, pp. D52a-54a).

It is thus not unfair to say that Campisi had to stand trial under an indictment containing 538 substantive Counts, on what ultimately turned out to be, in actuality, three or perhaps four distinct alleged offenses.

As for the conspiracy Count naming Campisi (Count 540), this was dismissed by the Trial Court. We shall show *infra* that the Court below apparently did not take into consideration certain persuasive record indications (to which we shall refer) that the conspiracy Counts were dismissed by the Trial Court not merely for simplification, as the Court below apparently thought, but because the proof as to those Counts was deemed by the Trial Court to be unsatisfactory.

Before presenting the further details as to the ways in which petitioner Campisi was prejudiced by the denial of a severance under this prodigious indictment, we pause to note the circumstances of the defense motions in the District Court for relief addressed to the joinder aspects of the indictment and its extraordinary scope. This portion of the trial proceedings is printed in full in the Government's appendix in the Court below at pp. 2a to 10a. It is true, as the Court below noted in its opinion, that counsel for one of the other defendants (Mr. Direnzo, representing defendant Sanantonio) acknowledged to the District Court that the Court "would be perfectly justified" in denying the motion for severance—which was being made for the first time on the morning of the commencement of the trial, January 2, 1962—on the ground that the application was not timely (*id.*, 2a-3a). However Mr. Direnzo qualified this concession by stating also to the District Court that denial of the motion for untimeliness would be justified "in the for-

mal course of events" (*id.* 2a). In other words, Mr. Direnzo was requesting the Court to consider the extraordinary circumstances presented, and not to treat the motion for severance in an ordinary manner as regards the issue of timeliness. Furthermore, when it came time for counsel for the instant petitioner Campisi to present his own motion for severance, there was not even any such qualified concession as we have just described *per* Mr. Direnzo. Campisi's attorney, Mr. Bozza, addressed the Trial Court at *id.* 7a-9a; this, as noted, was on the morning of January 2, 1962. Mr. Bozza informed the Court that Campisi had not been brought into the case until the unsealing of a superseding indictment (which was late in November, 1961—see Appellants' printed Appendix (filed with the companion petition in No. 383), Docket entries, at D1a; that he (Mr. Bozza) had been almost continuously engaged in another trial from shortly after the time of Campisi's arrest until shortly before the Christmas holidays; that on December 27, 1961 he (Mr. Bozza) had made known to the District Court that he was not prepared to proceed with the trial because of the press of his then recently concluded other engagements and that the Judge on that occasion had instructed Mr. Bozza to make his application to the Judge who should be assigned to the trial; and that denial of a severance in view of the enormous scope of the indictment would intensify the difficulties faced by the Campisi defense in being required to proceed to trial with all of the other defendants under the entire indictment. See Government's Appendix in the Court below, pp. 7a-9a.

Thus, Campisi's counsel in the Trial Court not only made no concession, qualified or otherwise, on the issue of untimeliness, but he vigorously urged the justness of granting a

postponement and a severance to Campisi on grounds distinctly applicable to that defendant. While the opinion of the Court of Appeals did note (with seeming reference to Campisi) that the District Judge was informed of counsel's press of other engagements and of the failure of predecessor counsel to make a timely motion, the opinion apparently did not take into account the fact that Campisi had not even been brought into this case until nearly the end of November, 1961, which places the matter in a light more favorable to Campisi. It should also be noted that the District Judge who at that time (late Nov. 1961) was assigned to the matter had set a date for the making of motions which came very crowdedly soon thereafter (December 4, 1961), at which time Mr. Bozza, who as seen had just entered the case, was unavoidably occupied with prior tasks in the other case above mentioned.

We turn now to the details of the trial proof herein:

First, of the three accomplice witnesses upon whom the Government relied to prove both the substantive and conspiracy counts, two of them, Levine and Parks, did not inculpate petitioner Campisi in any way. Levine's only mention of Campisi was that he had met him in the course of gambling activities (no date given) (Tr. 186). In fact, at Tr. 377 Levine specifically stated that in all the activities to which he had testified he never had any "conversations, transactions or dealings whatsoever with Anthony Campisi". Nor had Levine ever met the third accomplice witness, Bartkofsky, whom the Government sought to link with Campisi (Tr. 315). Also, the prosecutor stated for the record that nothing connected with the testimony of Levine and Parks was being offered with respect to Campisi (Tr. 210); compare also the prosecutor's statements at Tr. 203-

205, declaring that exhibits offered in connection with Levine did not relate to Campisi. Again, when the accomplice witness Parks testified (Tr. 409-464) there was not one word about Campisi. All of this testimony by Levine and Parks, and the collateral testimony relating to the transactions in which those two accomplice witnesses allegedly participated, accounted for 334 of the 538 substantive Counts, which had nothing to do with Campisi but which were brandished before the jury *viz* this astounding use of the Government's right of "joinder".

Second, there were an additional 70 substantive counts which likewise had nothing to do with Campisi, *viz.*, Counts 335 through 404, which involved only the defendants Bartkofsky and Donatiello.

Third, and still more striking, even the Counts which supposedly were to be shown to involve Campisi, *viz.*, Counts 405 through 538, turned out to be almost entirely composed of sound and fury, as we earlier intimated. These latter 134 substantive Counts washed out at the trial as follows:

One hundred of these 134 Counts were dismissed by the Trial Judge as relating not to Campisi but to another defendant, Donatiello (forgery counts 405 through 454, and uttering Counts 472 through 521). See Tr. 799-803, 807, 868, 1003.

After the elimination of the above mentioned 100 Counts against Campisi, there remained in the case against him, as earlier mentioned, 17 forgery plus 17 uttering Counts (Numbers 455 through 471, and 527 through 538, respectively) (Tr. 1003). However, of these 17 (or 34) Counts, there were 5 forgery and 5 uttering Counts which should plainly

have been dismissed by the Trial Court just as had been the 100 Counts above mentioned. These last mentioned 5 (or 10) Counts were numbers 458 through 462, and 525 through 529, relating to the so called LaCorte bonds. Bartkofsky himself had testified that as to these LaCorte bonds he could not remember at all whether he had cashed them for Campisi, and he expressly stated on the witness stand that he wanted to "leave them out" (Tr. 733-734; see also Tr. 776-777). The Trial Court had apparently overlooked or failed to recall accurately this testimony of Bartkofsky concerning the LaCorte bonds.

Even more seriously prejudicial to Campisi's chance for a fair trial of the distinct issue of his own guilt or innocence under this remarkable indictment, were the circumstances which developed at the trial in connection with the two conspiracy counts (numbers 539 and 540). Campisi was named only under the second of these conspiracy counts (number 540). Ultimately, the Trial Court dismissed both of the conspiracy counts (Tr. 1002-1003). The Court of Appeals said, "The conspiracy Counts were amply proved and were dismissed only to simplify the issues". But it was precisely in connection with these conspiracy counts, and the Government's efforts at "proof" thereof, that the Trial Court most vigorously and repeatedly expressed its exasperation over the hopelessly confused development of those "proofs". Thus, rather early in the trial, in connection with the so called "Marron" bonds, the prosecutor offered those bonds on both conspiracy counts, but in the course of colloquy, the Court became convinced that they could not be received in evidence against Campisi under the conspiracy count in which he was named (Count 540). See Tr. 490-493. Similarly, during the testimony of the

accomplice witness Bartkofsky, the Court was obliged to reject the prosecutor's efforts to "prove" an alleged conspiratorial linkage affecting Campisi in connection with certain alleged transactions in New Jersey, the Court remarking that the conspiracy had not yet been proved (Tr. 627); and at Tr. 640 the prosecutor apparently himself agreed to drop this phase of the case against Campisi—this episode involving Bartkofsky and the alleged New Jersey transactions appears at Tr. 617-640.

Similarly, but even more profoundly confusing, the Government's efforts to prove the conspiracy count against Campisi in connection with certain alleged happenings in Middletown, New York should be noted. See Tr. 635-648, where (especially at Tr. 646 et seq.), the Trial Court's exasperation reached probably its highest point during the entire trial over the Government's confusing use of the conspiracy "proofs".

But the worst confusion of all in connection with the conspiracy phase of the case occurred in connection with the so called Fankuchen bonds which the prosecutor attempted to connect with Campisi on the conspiracy count (No. 540). This "Fankuchen" phase appears at Tr. 651-671. At the end of this portion of the testimony concerning the "Fankuchen" bonds the Trial Court was prompted to remark, in ruling upon a motion by one of the other defendants to strike the testimony, that "I don't know what you are worried about. He [the prosecutor] didn't seem to get anywhere" (Tr. 671).

During the extended colloquy which occurred subsequently upon the motion to dismiss at the end of the Government's case, the Trial Court repeatedly expressed its

dissatisfaction with the conspiracy phase of the case, and we respectfully submit that nowhere in the record did the Trial Court manifest its belief that the conspiracy Counts had been proved. See Tr. 797-868.

Notwithstanding the District Court's dismissal of all but a small fraction of the substantive counts, and its dismissal of both of the conspiracy counts, and notwithstanding the Court's express ruling prior to the summations that "I take it that all counsel will argue on only the Counts that are still in the indictment" (Tr. 870), the Court subsequently made rulings whose necessary effect was that the jury would be permitted to consider all of the evidence which had been introduced by the Government on all of the original 540 Counts of the indictment, over the vigorous objection of the defense (Tr. 1129-1130, Tr. 1158, Tr. 1197).

Thanks to the leaving in of all of this evidence which had been received under the dismissed Counts, the jury case against the petitioner Campisi was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a "ring" with which the evidence under the relevant remaining Counts against Campisi did not actually link him in any way except in regard to the few Bartkofsky transactions to which we have above referred.

For a case which, when washed down to its ultimate maximum proportions as to Campisi, ended up involving not more than three or four actual distinct alleged transactions, the Government blazoned its way, from the Grand Jury stage onward and down through the trial jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts,

which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs, see, e.g., in the Government's printed Appendix, 205a-213a, 237a-238a; see also Tr. 667-668, 813-814, 845-847, 1148-1149; and see, in appellant's Appendix, D158a, 160a-161a. Even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against this petitioner did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

Reasons for Granting the Writ

1. As in the companion petition in No. 383 at this Term, the instant petition submits as its primary reason for granting the writ that, in their overall impingement upon the rights of the petitioner, the prosecutive devices used in this case and the failure of the Trial Court to stay the Government's hand, present a situation of outstanding importance for this Court's intercession in the interests of the fair and rational administration of federal criminal justice. The petition in No. 383 cites the numerous expressions by the District Court excoriating the Government for bringing on this "monstrosity" of an indictment (pp. 7-8,

14). Our statement of the case herein shows the manifold ways in which the trial proofs rendered it impossible for the petitioner Campisi to get a fair trial of the distinct issue of his own guilt or innocence, owing to the stupefying welter of "proofs" addressed to 540 Counts which, when washed down, left only a tiny fragment of the original number of counts as against petitioner Campisi.

Petitioner respectfully adopts the following from pp. 14-15 of the Petition in No. 383:

> "The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to surmise. Conspiracy, the "prosecutors darling", was of course to be expected here. But by the intermingling of conspiracy with aiding-and-abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the quite distinct segments of the several defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunder-buss targets only if the Courts interfered as a matter of law and procedural justice."

In view of all of the foregoing, we respectfully submit that the District Court's refusal to consider Campisi's motion for severance at the outset of the trial on the ground of untimeliness was an abuse of discretion; and that the decision of the Court of Appeals to the contrary should be reviewed by this Court in the interests of the fair administration of federal criminal justice.

While there appears to be little express authority on the point, it would seem that there exists the power to review, on the test of abuse of discretion, rulings of a District Court

declining to entertain a motion under Rule 12 on the ground of untimeliness. Cf. *Cleaver* v. *United States*, 238 F. 2d 766, 769 (C.A. 10, 1956).

But, in any event, we urge also that the points here in question partake of the quality of due process constitutionality, so that the defense motion was not one that could be waived in the manner asserted by the Trial Court and by the Court below but was in the nature of a motion addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, the decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability, in principle, of indictments of this portentously over-aweing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving factors which exist in this case. E.g., *People* v. *Allen*, 352 Ill. 262, 185 N.E. 605 (1933) (16 Counts).

2. Apart from the point above urged as to the due process aspect of the situation, the case is appropriate for certiorari on the issue of misjoinder and rights of severance on the distinct ground of the impact of the dismissal of the con-

spiracy counts. Cf. *Schaffer* v. *United States*, 362 U. S. 511, 516. As we believe was demonstrated in our Statement of the Case, it would have been a correct ruling by the Trial Court to have expressly dismissed the conspiracy count affecting Campisi (Count 540) for failure of proof. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which this Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of certiorari in this case for the sake of preserving the fair administration of federal criminal justice.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue in this case. The decision below should not be permitted to stand as a guide for future federal criminal trials.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

(Printed in appendix to companion petition in No. 383, October Term, 1962.)

APPENDIX B

Judgment of Court of Appeals

(Printed in appendix to companion petition in No. 383, October Term, 1962.)

APPENDIX C

Judgment of District Court

(Filed as part of certified transcript of record in No. 383, October Term, 1962.)

APPENDIX D

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY CAMPISI,

Petitioner-Defendant-Appellant.

PETITION FOR REHEARING

Jerome Lewis, Brooklyn, New York,
Attorney for Petitioner-
Defendant-Appellant.

Petition for rehearing denied.

H. J. F.
I. R. K.
P. R. H.
U. S. C. JJ.

October 3, 1962.

APPENDIX E

Constitutional Provisions, Statutes and Rules

(Printed in appendix to companion petition in No. 383, October Term, 1962.)

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 538

ANTHONY CAMPISI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (II R. 313–321) is not yet reported.[1]

[1] Petitioner Campisi and the petitioners in No. 383 (Coppolla and Sanantonio) were jointly tried and convicted under the same indictment, petitioner Campisi having been convicted on different counts. The government filed a brief in opposition in No. 383 on October 29, 1962.

The record in both cases is the same. "II R." designates the government's appendix in the court of appeals which contains excerpts from the trial transcript and to which have been added the proceedings in the court below. "I R." denotes the separately paginated "Appendix to Appellants' Briefs" in the court of appeals, containing, *inter alia*, the indictment and the trial court's instructions. Also on file with the Clerk of this Court is the trial transcript which, when referred to herein, is designated "Tr."

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (II R. 322). On September 19, 1962, the court of appeals recalled its mandate and entertained a petition for rehearing which was filed on October 1, 1962, and denied on October 3, 1962.[2] The petition for a writ of certiorari was filed on October 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the number and nature of the counts in the indictment and the joinder of offenses and parties fatally prejudiced petitioner, where the charges against him which were submitted to the jury consisted of a limited number of substantive counts, as to which the evidence was compartmentalized in the government's case and segregated in the trial court's charge.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are 18 U.S.C. 2(a) and 495, and Rules 8 and 14 of the Federal Rules of Criminal Procedure. They are printed in the appendix, *infra*, pp. 19–20.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner (Anthony Campisi), one Anthony J. Dona-

[2] The proceedings in the court of appeals with respect to the recall of its mandate and the ultimate denial of the petition for rehearing are lodged with the Clerk.

tiello and the petitioners in No. 383 (Edward-Carmine Coppolla and Alfred Sanantonio) were each convicted of aiding and abetting the forging of endorsements on United States Series E Savings Bonds and the uttering of these forged statements in violation of 18 U.S.C. 495 (Appendix, *infra*, p. 19) (Tr. 1203–1204). Petitioner Campisi was convicted on 34 counts of aiding and abetting Thomas Bartkovsky in the forging and uttering of seventeen of these bonds. He was sentenced to eight years' imprisonment on each count, the sentences to run concurrently (Tr. 1231–1232). On appeal the court of appeals unanimously affirmed his conviction (11 R. 313–321).

The government, in its Brief in Opposition in No. 383 (pp. 2–10), has described the scope and theory of the indictment, the proceedings relating to the motions for severance, the dismissal of counts at the close of the government's case and, with some particularity, the evidence dealing with petitioners Coppolla and Sanantonio. Here, we will discuss these matters as they relate to petitioner Campisi, and will also set forth more fully the evidence as to Campisi's involvement in the illegal bond-cashing.

THE INDICTMENT AND THE DISMISSAL OF COUNTS

The indictment contained 540 counts. Counts 1–538 charged the forging and uttering of forged en-

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The two petitioners in No. 383 (Coppolla and Sanantonio) were convicted on eighteen counts of aiding and abetting, involving nine bonds. Each was sentenced to an eight-year concurrent prison sentence (Tr. 1233–1234, 1253–1254). Donatiello was convicted on three hundred thirty-two counts and sentenced to a term of nine years on each count, to run concurrently (Tr. 1260).

dorsements on each of 269 United States Series E Savings Bonds; counts 539 and 540 charged conspiracies to commit these substantive offenses (I R. 9–63). Each of the 269 bonds was treated in two counts—one count charging forgery and the other uttering of the forged instrument. In substantive counts 405–538, petitioner Campisi was charged with aiding and abetting Thomas Bartkovsky, in forging and uttering bonds (I R. 45–57), and in count 540 with conspiring with Bartkovsky and Anthony J. Donatiello in a bond-cashing scheme (I R. 61–63).[4]

Before the jury was impanelled on the day fixed for trial (January 2, 1962), petitioner as well as other defendants moved for severances based on the length of the indictment and the joinder of offenses. The court denied the motions as having been made too "late" (II R. 5; see the government's Brief in Opposition, No. 383, pp. 4–5).[5] In support of his motion, counsel for petitioner Campisi had urged that the indictment had not been unsealed until late November 1961;[6] that he had been engaged in another trial for the first three weeks in December; and that he had advised the district judge before whom the case had

[4] Petitioners in No. 383 were named as aiders and abettors in substantive counts 1–334 (I R. 10–38), and as co-conspirators of Herbert Levine, Meyer Parks and Anthony Donatiello in count 539 (I R. 57–60).

[5] Not guilty pleas had been entered in November 1961 and the district court had fixed December 4, 1961, as the date for pre-trial motions. No motions were made on that date relating to the length of the indictment or the joinder of offenses and no extension of time in which to make such motions was sought or granted (see the Appendix to the Petition in No. 383, p. 8).

[6] The indictment was returned on October 27, 1961, and unsealed on November 20, 1961 (I R. 1).

come on December 27, 1961, for the purpose of making an assignment for trial, that under the circumstances he was not ready for trial and had been told to make his application to the trial judge (II R. 7–8). Counsel also moved for severance on the ground that, since Campisi was named only in the last half of the indictment (Counts 405–538, 540), he would be prejudiced by a joint trial since counsel "would have to sit by and let all of the testimony about the 405 counts" in which his client was not named "go into the case" (II R. 9). In denying the motion, the trial court pointed out that Campisi's trial counsel had been in the case since November,[*] that the fact that counsel had other commitments "doesn't * * * mean that he can't handle the first matter" but constitutes a "problem that every lawyer has," and that the fact that Campisi was named only in the latter counts of the indictment provided counsel with "the great advantage of something to talk about, * * * [since] they are talking about other people and not your client most of the time" (II R. 8–9). The court stated further that he was going to do everything he could "to keep the thing clear" (II R. 9).

The case thereupon proceeded to trial with four defendants, Campisi, Coppolla, Sanantonio and Donatiello; three others, Levine, Parks and Bartkovsky, had entered guilty pleas (Tr. 19–21, 22–24, 24–26). At the close of the government's case, the court dismissed the two conspiracy counts to simplify the case

[*] Petitioner's trial counsel had filed his notice of appearance on November 21, 1961 (I R. 1) and had represented petitioner when he entered his not guilty plea the next day.

for the jury. A number of substantive counts were also dismissed (II R. 230–240; see also Tr. 797–874). As a consequence, the charges against petitioner Campisi were reduced to 34 substantive counts involving 17 Series E Bonds (counts 455–471, 522–538).

THE EVIDENCE

The evidence at the trial revealed that large quantities of stolen Series E Savings Bonds had been unlawfully cashed starting in spring 1960 and continuing until January 1961.

a. In late April or early May 1960, Thomas Bartkovsky joined with "Blotchie" Donatiello and petitioner Campisi in a bond-passing scheme. According to Bartkovsky, he discussed the matter with Donatiello who explained the bond cashing "procedures" to him, "how you go about it, and how easy it was" (II R. 178–179). The next morning pursuant to prearrangement, Bartkovsky met with Donatiello and petitioner Campisi in Newark, New Jersey. The three men then drove to Somerville, New Jersey to cash bonds (II R. 179–180). During this trip, both Campisi and Donatiello further explained the bond-cashing techniques to Bartkovsky—"what to say if certain questions were asked by the tellers, and how to act, * * * and * * * how to present yourself when you walk into a bank" (II R. 180). At

The only substantive counts dismissed as to Campisi involved the "McKeon" bonds (counts 405–454, 472–521). These counts were dismissed because of the trial court's erroneous assumption that Thomas Bartkovsky had said that he received those bonds for cashing from Anthony Donatiello, rather than Campisi (compare Tr. 800–802, 807, 866–867, with II R. 188–189).

this time, Bartkovsky said, Campisi gave him as "identification" a New Jersey driver's license which Bartkovsky signed in the name of the registered owner of the bonds to be cashed that day (II R. 181). Following this, Bartkovsky entered a bank in Somerville and cashed the bonds (II R. 182). He gave the money he received and a slip indicating how many bonds had been cashed to Campisi (*ibid.*). After the three men had returned to Newark, Campisi gave him "some money back" (II R. 182–183). From that time until the middle of June 1960, Bartkovsky, accompanied by Donatiello and Campisi and using for identification blank driver's licenses supplied by Campisi, successfully cashed stolen bonds in Boundbrook, New Jersey, and Albany, New York (II R. 183–187).

Bartkovsky further testified that Donatiello and Campisi "broke up" in the middle of June 1960. Thereafter, Bartkovsky continued to work with each separately (II R. 187–188). He said that during the summer and fall of 1960, Campisi supplied him with the "McKeon" (counts 405–454, 472–521; I R. 46–52, 55–56; II R. 188–189), "Zimmer" (counts 455–457, 522–524; I R. 52, 56; II R. 189), "Lacorte"* (counts 458–462, 525–529; I R. 52–53, 56; II R. 190) and "Shamblen" (counts 463–467, 530–534; I R. 53, 56–57; II R. 190) bonds. Bartkovsky testified that he forged the endorsements on those bonds; that, with drivers' licenses provided by Campsisi, he cashed the

*On cross and re-direct examination, Bartkovsky stated that he was not certain for whom he had cashed the "Lacorte" bonds (see Tr. 733–734; 776–777).

bonds in small towns in New York State including Poughkeepsie, Newburgh, Tarrytown and Middletown; and that he received from Campisi twenty-five percent of the profits of the cashed bonds (II R. 188–190).[10] The bond owners testified that these bonds had been stolen from them; that they had never signed or endorsed them; and that they had never authorized anyone else to endorse or cash them (see, *e.g.*, II R. 155–160, 160–163, 164–166, 167–169, 169–171).[11]

Miss Elaine Walsh, a waitress at a tavern in Middletown, New York, stated that, in the fall of 1960—during the period when Bartkovsky had said he cashed bonds in Middletown with Campisi—she saw Bartkovsky in the tavern "[t]hree or four times" and that Campisi was with him "once or twice" (II R. 173, 175).

Bartkovsky further said that at the end of November 1960 (November 29), he received from Campisi $15,000 worth of bonds in the name of Sam Fankuchen which he also cashed (II R. 202–203, 206). Dr. Fankuchen testified that on October 28, 1960, $83,000 worth of Series E Bonds had been stolen from his

[10] Bartkovsky also testified that he cashed the "Burke" and "Kuklus" bonds for Campisi in October and November 1961 in Middletown (II R. 191–193, 200; cf. II R. 167–169).

[11] Alfred Raccuia also identified certain bonds introduced at trial as having been stolen from him and stated that he never authorized anyone to endorse or cash them. These bonds bore Bartkovsky's handwriting and formed the basis of substantive counts submitted against petitioner Campisi (counts 468–471, 535–538; I. R. 54, 57; II R. 226–230). There was no express testimony from Bartkovsky as to where and from whom he had obtained these bonds.

Brooklyn home and that he had not endorsed them or authorized anyone to sign his signature and cash them (II R. 44–46, 55–57). Bartkovsky further stated that, sometime in November, 1960, he had received Fankuchen bonds from Donatiello to be cashed (II R. 209–210).

Petitioner testified in his own defense denying that he had given Bartkovsky any bonds to cash or that he had ever accompanied him on bond cashing trips (Tr. 914, 923–924).

b. The evidence relating to the petitioners in No. 383 showed that during the spring and summer of 1960, first Herbert Levine and then Meyer Parks joined in a bond cashing scheme with "Blotchie" Donatiello; that they cashed stolen Series E Bonds which had been obtained from Donatiello, receiving as payment a percentage of what the bonds brought back and utilizing forged New York state driver's licenses for identification purposes; that in the summer of 1960, when their supply of bonds was exhausted, Levine and Donatiello entered into dealings with Coppolla and Sanantonio to purchase bonds; that after several meetings to this end, they purchased thousands of dollars worth of stolen Fankuchen bonds from Coppolla and Sanantonio for a price representing a percentage of the actual value of the bonds; that Levine, on his own, thereafter purchased additional quantities of Fankuchen bonds from Coppolla and Sanantonio; and that Levine and Parks, after forging Dr. Fankuchen's signature, cashed these bonds.[12]

[12] This evidence is detailed more particularly in the government's Brief in Opposition in No. 383, pp. 6–9.

THE TRIAL COURT'S INSTRUCTIONS

In his instructions the trial judge stated, *inter alia*, that the jury was the exclusive judge of the facts (I R. 162) and that the government had the burden of establishing guilt beyond a reasonable doubt (I R. 163–164). He detailed the nature of the offenses charged in the indictment (I R. 164–166), and then proceeded to marshall the evidence as to each defendant by the count in accord with his previous statement that he was going to "discuss and consider each defendant separately" (I R. 165, see I. R. 167–177). With respect to petitioner Campisi, the court stated the charges against him and summarized the bond cashing arrangements, as testified to by Bartkovsky, and Campisi's denial that he had ever participated in bond cashing (I, R. 176–177). The court further instructed the jury that it was called upon "to determine guilt or innocence of the different defendants under the different charges of the indictment" and that such guilt "must be determined individually" (I R. 164). The court further observed that the evidence against each defendant rested "essentially" on accomplice testimony (I R. 177), and that, while the "testimony of an accomplice alone, if believed * * *, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence * * * such testimony is to be received with caution and weighed with great care" (I R. 178). The court further advised the jury in this connection that it "should not convict a defendant upon the unsupported testimony of an accomplice

unless [it] believe[d] the unsupported testimony beyond all reasonable doubt" (*ibid.*).

ARGUMENT

Unlike the petitioners in No. 383 (Coppolla and Sanantonio), petitioner Campisi does not seriously challenge the sufficiency of the evidence to support his conviction for aiding and abetting the forging and uttering of stolen Series E bonds. Rather, petitioner relies basically on the claim (alternatively made by petitioners in No. 383) that he was denied a fair trial because of the length of the indictment, the joinder of defendants and offenses, and the ultimate dismissal of the conspiracy counts.

The facts as they relate to petitioner show that 34 counts involving 17 bonds stolen from four people were submitted to the jury; that the probative evidence relating to these counts was neither complex nor involved; that the government's case was developed at trial in such a fashion that the evidence relating to petitioner and his dealings with Donatiello and Bartkovsky was kept discrete from the evidence which detailed the bond-passing arrangements of Coppolla, Sanantonio, Donatiello, Levine and Parks; that the trial court in its instructions reinforced this segregation of the proof by marshalling the facts as to each defendant, so pinpointing the evidence on the counts left in the case involving petitioner that the jury hardly could have been confused; and that the proof of petitioner's guilt was direct, unambiguous and convincing.

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[13] Zimmer, Lacorte, Shamblen, and Raccuia.

As we pointed out in our brief in opposition in No. 383 (p. 11), to the extent that the alleged confusion and impropriety is said to stem from the length of the indictment, such a claim overlooks the fact that the indictment was long simply because a substantial number of bonds—each the subject of two separate counts, one for forgery and one for uttering—were involved. The indictment reflected the scope and nature of the criminal conduct charged and was not complicated or complex. And (as we also pointed out in our Brief in Opposition in No. 383, pp. 11–12) the fact that two bond cashing groups were involved, requiring two discrete conspiracy counts, did not necessarily indicate that confusion would result from a joint trial. The two conspiracy counts had a common defendant (Donatiello), charged parallel schemes and involved the use of the same techniques for the same illegal purpose, generally during the same time priod (see I R. 57–63). Consequently, joinder as an initial matter was proper. See Rule 8, Federal Rules of Criminal Procedure (Appendix, *infra*, p. 20); *Schaffer* v. *United States*, 362 U.S. 511, 514. There was no reason why, on the basis of the indictment alone, the court should have severed the case against petitioner. Indeed, none of the defendants made any pre-trial motions challenging the indictment or requesting severance until the morning fixed for the commencement of trial, more than a month after the date set by the Court for the making of such motions (see II R. 2–10). Petitioner (Pet. 8–9) seeks to excuse his failure in this regard by claiming that his trial counsel had insufficient time

to make such motions in view of the press of other engagements. The fact remains, however, that trial counsel had noted his appearance for Campisi on November 21, 1961 (1 R. 1), and had represented him the next day, when Campisi entered his not guilty plea. At that proceeding the court (Judge Levet) had advised counsel that pre-trial motions were returnable on December 4. No extension of time to prepare such motions or adjournment for any other reason was requested by counsel at that hearing.

As the case was submitted to the jury there was no reasonable basis to believe that the jury would be confused. To simplify the case, the court had dismissed the two conspiracy counts (see Tr. 796-866). It had also dismissed various substantive counts with the result that 34 counts involving only 17 bonds were submitted against petitioner to the jury.[14] The evidence at trial was developed in a compartmentalized and readily separable manner (see Brief in Opposition, No. 383, pp. 12-13). Moreover, the government so presented its case that the basic testimony relating to the Coppolla, Sanantonio, Donatiello, Levine and Parks bond cashing preceded the testimony relating to Campisi. The evidence against him was direct and simple. It consisted essentially of the testimony of the various bond holders who identified their stolen bonds and stated that they had never endorsed or cashed them or authorized anyone else to

[14] All of the substantive counts which were dismissed dealt with the "McKeon" series of bonds (counts 405-454; 472-521). They were dismissed because the trial court incorrectly recalled Bartkovsky's testimony relating thereto (See Statement, *supra*, pp. 6, n. 8).

do so (see, *e.g.*, II R. 155–160; 160–163; 164–166; 167–169; 169–171), and the testimony of Thomas Bartkovsky who, after recounting his bond cashing experiences with Campisi and Donatiello when the latter two were proceeding as partners, detailed his specific dealings with Campisi after the partnership had been dissolved. In this connection, Bartkovsky identified stolen bonds as the ones that he had received from Campisi for cashing and testified that Campisi gave him blank licenses for identification purposes, and accompanied him on his bond-cashing trips. He stated further that he received a percentage of the profits from these cashed bonds, the remainder of the money going to Campisi (see II R. 187–195, 202–203, 206; cf. II R. 152–154). In short, the evidence implicating petitioner stemmed basically from a single witness (Bartkovsky), was direct and uncomplicated and related to the unlawful cashing of a limited number of stolen bonds. Finally, the trial court in its charge to the jury further segregated the proof, setting out by the count the evidence as to each defendant (see I R. 167–177), and admonishing the jury that "[t]he guilt or innocence of each defendant must be determined individually" (I. R. 164). In the circumstances, there is no reason to suppose that the

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Petitioner raises as a question (Pet. 3), but does not argue that the trial judge erred in not requiring corroboration of accomplice testimony. As we said in No. 383 (p. 13, n. 10), the rule in the federal courts has long been otherwise under this Court's decision in *Caminetti v. United States*, 242 U.S. 470, 495. The trial judge here carefully instructed the jury that accomplice testimony was to be "received with caution and weighed with great care" (I. R. 178; see Statement, *supra*, p. 10).

jury failed to follow the court's instructions. Cf. *Delli Paoli* v. *United States*, 352 U.S. 232, 239; *Opper* v. *United States*, 348 U.S. 84, 94–95.

Like the petitioners in No. 383, petitioner Campisi further urges that although the conspiracy counts were dismissed, all of the evidence relating to those counts improperly remained in the case, necessarily resulting in jury confusion and fatal prejudice (Pet. 11–14, 16–17). But Campisi did not at any stage of the trial, seek relief from the joinder by motion under Rule 14 of the Federal Rules of Criminal Procedure (see Appendix, *infra*, p. 20). As a matter of fact, when, at the close of the government's case, the trial court ruled that the fact that the conspiracy counts were being dismissed did not affect the admissibility of evidence, petitioner's counsel made no objection (see Tr. 863–865). Nor did he object to that portion of the trial court's charge in which the court marshalled the evidence.[16] Cf. *Schaffer* v. *United States*, 362 U.S. 511, 516.

Petitioner makes no showing of prejudice now. His reference (Pet. 11–12) to a few isolated incidents during the trial when the trial court may have expressed its displeasure with a particular item of proof on the conspiracy counts or have refused to allow in certain evidence against a particular defendant is

[16] Counsel did call the court's attention to its erroneous reference to the "McKeon" bonds counts which the trial court had previously dismissed. The court promptly rectified its error in this regard advising the jury that the "McKeon" counts were no longer in the case (see Tr. 1177, 1196).

[17] In this connection, we do not understand petitioner's reference to the "so called 'Marron' bonds" (Pet. 11). Francis J.

not an indication that the court thought the conspiracy counts were not proved or that prejudice necessarily resulted from the admission of evidence. On the contrary, if anything, the court's rulings limiting evidence to a particular defendant, militated against confusion and prejudice. Moreover, a fair reading of the full trial minutes of the court's colloquy with counsel at the conclusion of the government's case establishes, we submit, that the judge

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Marron, an executive of the Federal Reserve Bank of New York, was not a bond-owner whose bonds had been stolen or were otherwise involved in this case. He testified at trial generally to the procedures and practices of selling Series E bonds. He also examined the "Kerpan" bonds (counts 363-369, 395-404), which related only to dealings between Donatiello and Bartkovsky, and stated that although the validating bank stamps on these bonds appeared to be counterfeit, the bonds in all other respects appeared to be genuine obligations of the United States. His testimony in this regard was not received against Campisi, nor were these bonds admitted in evidence against any defendant at this point (see Tr. 476-495).

Further, petitioner's characterization of the Fankuchen bond testimony, and his claim that it gave rise to "the worst confusion of all" (Pet. 12) finds no support in the record. As far as petitioner Campisi was concerned, Bartkovsky had directly testified that he had cashed about $15,000 worth of Fartkuchen bonds for him (II R. 202-203); and, while Campisi was not named in any of the substantive counts involving Fankuchen bonds, this testimony was certainly relevant as proof of similar criminal conduct showing knowledge, motive and intent (cf. *United States* v. *Bollenbach*, 147 F. 2d 199, 200 (C.A. 2), reversed on other grounds, 326 U.S. 607), wholly apart from its admissibility on the conspiracy count. Moreover, the court's statement relied upon by petitioner in this connection that the prosecution did not "get anywhere" had nothing at all to do with this testimony but dealt entirely with a wholly unrelated conversation between Bartkovsky and Donatiello which was admitted only against Donatiello (Tr. 664-671).

dismissed the conspiracy counts not because he thought there had been a failure of proof, but rather for the purpose of simplifying the issues for the jury (see Tr. 797–874, particularly at Tr. 858–866). The record shows that there were repeated and specific statements during the trial to the effect that the evidence relating to the dealings between petitioners in No. 383 (Coppolla and Sanantonio) and their alleged co-conspirators (Donatiello, Levine and Parks) was not to be considered against Campisi (see, *e.g.*, H R. 25, 29, 33, 77, 81, 141). Insofar as evidence adduced at the trial was held admissible against Campisi, such evidence consisted (1) of the acts and statements of Bartkovsky, Campisi and Donatiello when all three were working together from late April to the middle of June 1960; and (2) the later bond cashing activities in which Campisi and Bartkovsky were alone involved. To the extent that such evidence related to the acts and statements of Campisi it was clearly admissible. Insofar as the evidence involved the acts and statements of Bartkovsky occurring out of the presence of Campisi[9] it was equally admissible on the substantive counts without the aid of the conspiracy counts. For even if no conspiracy had been charged, Bartkovsky and Campisi were plainly joint

[9] Bartkovsky had testified that he, Donatiello and Campisi had together embarked and participated in a common scheme of bond cashing in late April 1960 (H R. 179-188). This evidence, as the court of appeals held, "amply proved" the conspiratorial arrangement (see H R. 321).

[10] Bartkovsky's testimony as to his separate bond cashing arrangements with Donatiello after June 1960, was not admitted at trial against petitioner Campisi (see *e.g.*, H R. 201-202, 208-209, 217-218, 221-222, 225-226; cf. H R. 140-141).

venturers, and like rules of evidence would have applied. See *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *Facchia* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9). The sum of it is that petitioner was convicted on relevant and competent evidence which indisputably established his guilt on the substantive charges.[20]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

NOVEMBER 1962.

[20] Petitioner says (Pet. 11) that the substantive counts involving the "Lacorte" bonds (counts 458–462, 525–529), should not have been permitted to go to the jury because Bartokovsky who, on direct examination, had testified that he had received those bonds from Campisi, testified on cross and on redirect that he did not recall who gave them to him. But since petitioner's eight year concurrent sentence is wholly supportable on any of the substantive counts which has undisputable support in the evidence (e.g., the "Zimmer" bonds, counts 455–457, 522–524; see statement, *supra*, p. 7), there is no occasion for this Court to consider this contention. *Lawn* v. *United States*, 355 U.S. 339, 359; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

APPENDIX

18 U.S.C. 2 provides in pertinent part:

§ 2. PRINCIPALS.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

* * * * *

18 U.S.C. 495 provides:

§ 495. CONTRACTS, DEEDS, AND POWERS OF ATTORNEY.

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Rule 8 of the Federal Rules of Criminal Procedure provides:

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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No. 538

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 27447

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CAMPISI,

Petitioner-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING
(Upon Recall of Mandate)

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United States Court of Appeals

For the Second Circuit

Docket No. 27447

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CAMPISI,

Petitioner-Defendant-Appellant.

PETITION FOR REHEARING
(Upon Recall of Mandate)

To the Honorable Henry J. Friendly, Irving R. Kaufman, and Paul R. Hays, Circuit Judges:

This Court having recalled its mandate in the above entitled appeal by order of September 19, 1962, Petitioner Anthony Campisi, a defendant-appellant in the above entitled appeal, respectfully prays that a rehearing be granted to reconsider the decision and judgment of this Court rendered and filed July 23, 1962, which affirmed a judgment upon a jury verdict in the United States District Court for the Southern District of New York (Archie O. Dawson, D.J.), which convicted the defendant-appellant of violations of 18 U.S.C. §§495 and 2.

In support of this petition for rehearing, the following grounds and reasons are respectfully submitted*:

* Because the parties' respective printed appendices in this Court do not, even when read combinedly, include all those parts of the record which we find it necessary to discuss in this petition for rehearing, we are obliged to ask the Court's indulgence for our use herein of the full stenographic transcript of the trial in this case. Our page references to the testimony, therefore, will be both to said transcript ("Tr. ") and to the printed appendices ("D a" refers to appellants' Appendix, " a" refers to the Government's Appendix).

This Court's opinion affirming the judgment of conviction stated that the Court was not reaching the merits of questions raised by the instant petitioner and certain other defendants addressed to the length of the indictment, propriety of the joinder of defendants and offenses, and the denial by the Trial Court of motions to sever. These questions were not being reached, this Court stated, because it held that the objections were waived in the Trial Court.

It is to these questions which the Court declined to reach that this petition for rehearing is exclusively addressed.

By way of preliminary, let us indicate in a general way the setting in which this petition for rehearing will argue the questions above mentioned: We hope to show in this petition that, inasmuch as the questions referred to partake of the quality of due process constitutionality, the defense motions were not ones that could be waived in the manner determined by this Court but were in the nature of motions addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12 of the Federal Rules of Criminal Procedure. We shall ask the Court to reconsider, also, its apparent finding that petitioner Campisi, through his trial counsel, must in some manner bear the disadvantage of a statement by counsel for one of the other defendants at the trial which this Court characterized as being to the effect "that the Court would be fully justified in denying it [the motion for severance] as untimely".

The defendants who stood trial in this case, including petitioner Campisi, were tried under an indictment containing 540 Counts involving alleged forging and uttering of allegedly stolen United States Government Bonds. This Court's opinion in the recently decided appeal herein did not discuss the remarkable statistical actualities of this trial whereby this 540 Count indictment was washed down to a tiny fraction of that entire number of Counts when the

time finally arrived for submission of the case against petitioner Campisi to the jury. This washing down of the prodigious original number of counts did not occur, moreover, as we show in detail *infra*, until after the entire mass of "evidence" relating to the entire 540 Counts had been spread before the jury; indeed all of this evidence was permitted to remain for consideration by the jury even after all but a very small number of the counts had been dismissed by the Trial Court. Perhaps this Court's choice not to take notice of these statistical actualities (the details will be presented in a moment) was owing to the Court's aforementioned conclusion that the issues posed by the size of the indictment had been waived by the defense; or perhaps the issue was not brought vividly enough to the Court's attention in Campisi's appeal herein, where the statistics which we now desire to present were not developed in a detailed manner.

The statistics to which we refer, as to the way in which the 540 Counts were ultimately washed down to a tiny percentage of the original total, are as follows, as affects petitioner Campisi:

The original 540 Counts consisted of 538 substantive Counts and two conspiracy Counts. Of these 538 substantive Counts, Campisi in the first place was never even named in 404 of them. Campisi was orginally named only in Counts 405 through 471 (forgery) and Counts 472 through 538 (the corresponding uttering Counts). Since the use of separate Counts for the alleged forgeries and utterings worked a mere arithmetical doubling of the actual alleged offenses, it may be taken for the purposes of the present discussion that Campisi was originally named in 67 substantive counts. Of the two conspiracy counts, Campisi was named in only one of them (Count 540).

Of the 67 (or 134) original substantive Counts against Campisi, the only ones finally submitted to the jury were 17 forgery Counts plus the 17 corresponding uttering Counts

(Counts 455 through 471, and Counts 527 through 538, respectively) (Tr. 1003). We shall show *infra* that even as to these 17 (or 34) Counts which were sent to the jury, five of them (forgery), or ten (to include the uttering Counts), should absolutely have been dismissed by the Court for failure of proof (Counts 458 through 462 and Counts 525 through 529, respectively)—a point which was apparently not brought to this Court's attention at all in Campisi's appeal herein. Thus, at most, the Government's "case" against Campisi actually never involved more than 12 (or 24, if such 12 Counts are doubled) Counts, as to which Campisi was obliged to stand trial under an indictment naming numerous other defendants and charging 538 substantive offenses. And, even as to these 12 Counts, the actual alleged forgery-uttering incidents involved were comprised of only three or perhaps four distinct transactions (see the tabular indictment breakdown of Counts 455 through 457, and 463 through 471, in the appellants' printed Appendix in this Court, pp. D52a-54a).

It is thus not unfair to say that Campisi had to stand trial under an indictment containing 538 substantive Counts, on what ultimately turned out to be, in actuality, three or perhaps four distinct alleged offenses.

As for the conspiracy Count naming Campisi (Count 540), this was dismissed by the Trial Court. We shall show *infra* that this Court apparently did not take into consideration certain persuasive record indications (to which we shall refer) that the conspiracy Counts were dismissed by the Trial Court not merely for simplification, as this Court apparently thought, but because the proof as to those Counts was deemed by the Trial Court to be unsatisfactory. This last is especially important for our instant petition for rehearing, because this Court's conclusion that "the conspiracy Counts were amply proved and were dismissed only to simplify the issues" enters weightily into the overall picture which we are herewith praying the Court to

reconsider from the standpoint of whether Campisi's conviction should be reversed for violation of his rights of severance and to be free of prejudicial joinder.

Before presenting the further details as to the ways in which petitioner Campisi was prejudiced by the denial of a severance under this prodigious indictment, we pause to note the circumstances of the defense motions in the District Court for relief addressed to the joinder aspects of the indictment and its extraordinary scope. This portion of the trial proceedings is printed in full in the Government's appendix in the appeal herein at pp. 2a to 10a. It is true, as this Court noted in its opinion in this appeal, that counsel for one of the other defendants (Mr. Direnzo, representing defendant Sanantonio) acknowledged to the District Court that the Court "would be perfectly justified" in denying the motion for severance—which was being made for the first time on the morning of the commencement of the trial, January 2, 1962—on the ground that the application was not timely (*id.*, 2a-3a). However Mr. Direnzo qualified this concession by stating also to the District Court that denial of the motion for untimeliness would be justified "in the formal course of events" (*id.* 2a). In other words, Mr. Direnzo was requesting the Court to consider the extraordinary circumstances presented, and not to treat the motion for severance in an ordinary manner as regards the issue of timeliness. Furthermore, when it came time for counsel for the instant petitioner Campisi to present his own motion for severance, there was not even any such qualified concession as we have just described *per* Mr. Direnzo. Campisi's attorney, Mr. Bozza, addressed the Trial Court at *id.* 7a-9a; this, as noted, was on the morning of January 2, 1962. Mr. Bozza informed the Court that Campisi had not been brought into the case until the unsealing of a superseding indictment (which was late in November, 1961—see Appellants' printed Appendix herein, Docket entries, at D1a); that he (Mr. Bozza) had been almost continuously engaged in another trial from shortly after the time of Campisi's

arrest until shortly before the Christmas holidays; that on December 27, 1961 he (Mr. Bozza) had made known to the District Court that he was not prepared to proceed with the trial because of the press of his then recently concluded other engagements and that the Judge on that occasion had instructed Mr. Bozza to make his application to the Judge who should be assigned to the trial; and that denial of a severance in view of the enormous scope of the indictment would intensify the difficulties faced by the Campisi defense in being required to proceed to trial with all of the other defendants under the entire indictment. See Government's Appendix in this appeal, pp. 7a-9a.

Thus, Campisi's counsel in the Trial Court not only made no concession, qualified or otherwise, on the issue of untimeliness, but he vigorously urged the justness of granting a postponement and a severance to Campisi on grounds distinctly applicable to that defendant. While this Court's opinion in the appeal herein did note (with seeming reference to Campisi) that the District Judge was informed of counsel's press of other engagements and of the failure of predecessor counsel to make a timely motion, the opinion apparently did not take into account the fact that Campisi had not even been brought into this case until nearly the end of November, 1961, which places the matter in a light more favorable to Campisi. It should also be noted that the District Judge who at that time (late Nov. 1961) was assigned to the matter had set a date for the making of motions which came very crowdedly soon thereafter (December 4, 1961), at which time Mr. Bozza, who as seen had just entered the case, was unavoidably occupied with prior tasks in the other case above mentioned.

While there appears to be little express authority on the point, it would seem that this Court has the power to review, on the test of abuse of discretion, rulings of a District Court declining to entertain a motion under Rule 12 on the ground of untimeliness. Cf. *Cleaver* v. *United States*, 238 F. 2d 766, 769 (C.A. 10, 1956).

We turn now to the details of the extraordinary course of the trial proof herein, from which exposition we hope that this Court will agree with us that the Trial Court's refusal to entertain the Campisi motion for severance as untimely not only presents the question of abuse of discretion but (as above mentioned) also the question of whether it was error in any event to decline to consider the motion inasmuch as what was actually presented was a constitutional issue giving rise to the question of whether the indictment stated an offense and was therefore subject to a motion to dismiss at any time.

First, of the three accomplice witnesses upon whom the Government relied to prove both the substantive and conspiracy counts, two of them, Levine and Parks, did not inculpate petitioner Campisi in any way. Levine's only mention of Campisi was that he had met him in the course of gambling activities (no date given) (Tr. 186). In fact, at Tr. 377 Levine specifically stated that in all the activities to which he had testified he never had any "conversations, transactions or dealings whatsoever with Anthony Campisi". Nor had Levine ever met the third accomplice witness, Bartkovsky, whom the Government sought to link with Campisi (Tr. 315). Also, the prosecutor stated for the record that nothing connected with the testimony of Levine and Parks was being offered with respect to Campisi (Tr. 210); compare also the prosecutor's statements at Tr. 203-205, declaring that exhibits offered in connection with Levine did not relate to Campisi. Again, when the accomplice witness Parks testified (Tr. 409-464) there was not one word about Campisi. All of this testimony by Levine and Parks, and the collateral testimony relating to the transactions in which those two accomplice witnesses allegedly participated, accounted for 334 of the 538 substantive Counts, which had nothing to do with Campisi but which were brandished before the jury *via* this astounding use of the Government's right of "joinder".

Second, there were an additional 70 substantive counts which likewise had nothing to do with Campisi, *viz.*, Counts 335 through 404, which involved only the defendants Bartkofsky and Donatiello.

Third, and even more striking, even the Counts which supposedly were to be shown to involve Campisi, *viz.*, Counts 405 through 538, turned out to be almost entirely composed of sound and fury, as we earlier intimated. These latter 134 substantive Counts washed out at the trial as follows:

One hundred of these 134 Counts were dismissed by the Trial Judge as relating not to Campisi but to another defendant, Donatiello (forgery counts 405 through 454, and uttering Counts 472 through 521). See Tr. 799-803, 807, 868, 1003.*

After the elimination of the above mentioned 100 Counts against Campisi, there remained in the case against him, as

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* The testimony last cited in the text above shows that the Trial Court agreed with Campisi's counsel that Bartkofsky had testified he obtained the bonds involved in these counts from Donatiello, not Campisi, the Trial Court stating that his written notes so indicated, as did also the written notes of Campisi's attorney, Mr. Bozza. We have checked Bartkofsky's testimony on this point, and we must be candid in informing this Court that the stenographer's notes do not unequivocally either support or negate the recollection of the Trial Court and Mr. Bozza. During the direct examination of the accomplice witness Bartkofsky, as likewise during the examination of the other accomplice witnesses, the prosecutor was continually showing various bonds to the witnesses, and from time to time, just as was inevitably to be expected under this monster indictment, the witnesses' responses stand upon the stenographic record ambiguously as regards any attempt to pin those responses into precise connection with particular bonds. This confusion in the testimony was aggravated by the Government's intermingling of its substantive and conspiracy proofs, with various bonds from among the hundreds in the case being shown to witnesses and offered in evidence. A prime example of this confusing method of "proof" is found in the Bartkofsky testimony at Tr. 624-632. It is impossible to determine from the stenographic transcript just which bonds Bartkofsky was referring to when he said at Tr. 632 that he got certain bonds "from Campisi", although on the preceding page (Tr. 631) the witness was apparently being questioned about the bonds involved in forgery Counts 405 to 454.

earlier mentioned, 17 forgery plus 17 uttering Counts (Numbers 455 through 471, and 527 through 538, respectively) (Tr. 1003). However, of these 17 (or 34) Counts, there were 5 forgery and 5 uttering Counts which should plainly have been dismissed by the Trial Court just as had been the 100 Counts above mentioned. These last mentioned 5 (or 10) Counts were numbers 458 through 462, and 525 through 529, relating to the so called LaCorte bonds. Bartkofsky himself had testified that as to these LaCorte bonds he could not remember at all whether he had cashed them for Campisi, and he expressly stated on the witness stand that he wanted to "leave them out" (Tr. 733-734; see also Tr. 776-777). The Trial Court had apparently overlooked or failed to recall accurately this testimony of Bartkofsky concerning the LaCorte bonds, and we regret that these facts were not brought to this Court's attention at the time of Campisi's appeal herein. We mention these facts now because they help still further to show how egregiously Campisi was prejudiced under this stupendous indictment of 538 substantive Counts, when, as we said earlier, he should at most have been tried under 12 of the forgery Counts and their corresponding uttering Counts—which, as also noted earlier, in any event involved only three or at most four distinct transactions.

Even more seriously prejudicial to Campisi's chance for a fair trial of the distinct issue of his own guilt or innocence under this remarkable indictment, were the circumstances which developed at the trial in connection with the two conspiracy counts (numbers 539 and 540). Campisi was named only under the second of these conspiracy counts (number 540). Ultimately, the Trial Court dismissed both of the conspiracy counts (Tr. 1002-1003). In all respectfulness, we believe it can be demonstrated that this Court was incorrect in the statement in its opinion in the appeal herein that "The conspiracy Counts were amply proved and were dismissed only to simplify the issues". It was precisely in connection with these conspiracy counts, and the

Government's efforts at "proof" thereof, that the Trial Court most vigorously and repeatedly expressed its exasperation over the hopelessly confused development of those "proofs". Thus, rather early in the trial, in connection with the so called "Marron" bonds, the prosecutor offered those bonds on both conspiracy counts, but in the course of colloquy, the Court became convinced that they could not be received in evidence against Campisi under the conspiracy count in which he was named. (Count 540). See Tr. 490-493. Similarly, during the testimony of the accomplice witness Bartkofsky, the Court was obliged to reject the prosecutor's efforts to "prove" an alleged conspiratorial linkage affecting Campisi in connection with certain alleged transactions in New Jersey, the Court remarking that the conspiracy had not yet been proved (Tr. 627); and at Tr. 640 the prosecutor apparently himself agreed to drop this phase of the case against Campisi—this entire episode involving Bartkofsky and the alleged New Jersey transactions appears at Tr. 617-640.

Similarly, but even more profoundly confusing, the Government's efforts to prove the conspiracy count against Campisi in connection with certain alleged happenings in Middletown, New York should be noted. See Tr. 635-648, where (especially at Tr. 646 et seq.), the Trial Court's exasperation reached probably its highest point during the entire trial over the Government's confusing use of the conspiracy "proofs".

But the worst confusion of all in connection with the conspiracy phase of the case occurred in connection with the so called Frankuchen bonds which the prosecutor attempted to connect with Campisi on the conspiracy count (No. 540). This "Fankuchen" phase appears at Tr. 651-671. At the end of this portion of the testimony concerning the "Fankuchen" bonds the Trial Court was prompted to remark, in denying a motion by one of the other defendants to strike the testimony, that "I dont know what you are worried

about. He [the prosecutor] didn't seem to get anywhere" (Tr. 671).

During the extended colloquy which occurred subsequently upon the motion to dismiss at the end of the Government's case, the Trial Court repeatedly expressed its dissatisfaction with the conspiracy phase of the case, and we respectfully submit that nowhere in the record did the Trial Court manifest its belief that the conspiracy Counts had been proved. See Tr. 797-868.

Notwithstanding the District Court's dismissal of all but a small fraction of the substantive counts, and its dismissal of both of the conspiracy counts, and notwithstanding the Court's express ruling prior to the summations that "I take it that all counsel will argue on only the Counts that are still in the indictment" (Tr. 870), the Court subsequently made rulings whose necessary effect was that the jury would be permitted to consider all of the evidence which had been introduced by the Government on all of the original 540 Counts of the indictment, over the vigorous objection of the defense (Tr. 1129-1130, Tr. 1158, Tr. 1197). We respectfully urge that the statement in the last sentence of this Court's opinion in the appeal herein that "It was not error to send to the jury the bonds that were the subject of Counts that were later dismissed because no motion to strike them was made and because, as proof that Campisi had committed similar acts, they remained admissible to show his knowledge, motive and intent", does not effectively meet Campisi's contention of prejudice in this regard in view of the overall circumstances which we have above described concerning the denial of Campisi's motion for severance.

Thanks to the leaving in of all of this evidence which had been received under the dismissed Counts, the jury case against the petitioner Campisi was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a

"ring" with which the evidence under the relevant remaining Counts against Campisi did not actually link him in any way except in regard to the few Bartkofsky transactions to which we have above referred.

For a case which, when washed down to its ultimate maximum proportions as to Campisi, ended up involving not more than three or four actual distinct alleged transactions, the Government blazoned its way, from the Grand Jury stage onward and down through the Trial Jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts, which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs see, e.g., in the Government's printed Appendix, 205a-213a, 237a-238a; see also Tr. 667-668, 813-814, 845-847, 1148-1149; and see, in appellants' Appendix, D158a, 160a-161a. Even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against this petitioner did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to surmise. Conspiracy, the "prosecutors darling", was of course to be expected here. But by the intermingling of conspiracy with aiding-and-abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the

quite distinct segments of the several defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunder-buss targets only if the Courts interfered as a matter of law and procedural justice.

In view of all of the foregoing, we respectfully submit that the District Court's refusal to consider Campisi's motion for severance at the outset of the trial on the ground of untimeliness was an abuse of discretion; and that this Court's decision to the contrary should be reconsidered.

But, in any event, we urge also that the points here in question partake of the quality of due process constitutionality, so that the defense motion was not one that could be waived in the manner asserted by the Trial Court and by this Court but was in the nature of a motion addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, the decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability in principle, of indictments of this portentously over awing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving factors which exist in this case. E.g., *People* v. *Allen*, 352, Ill. 262, 185 N.E. 605 (1933) (16 Counts).

Apart from the point above urged as to the due process aspect of the situation, this Court should reconsider the case

on the issue of misjoinder and rights of severance on the distinct ground of the impact of the dismissal of the conspiracy counts. Cf. *Schaffer* v. *United States*, 362 U.S. 511, 516. As we believe was demonstrated above, it would have been a correct ruling by the Trial Court to have expressly dismissed the conspiracy count affecting Campisi (Count 540) for failure of proof. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which the Supreme Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of rehearing in this case for the sake of preserving the fair administration of federal criminal justice.

WHEREFORE, it is respectfully prayed that this petition for rehearing should be granted.

Respectfully submitted,

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Certificate

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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